SUPREME COURT, U. S.
APR 11
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-6409

WALTON DACUS HAINING,
Petitioner,

vs.

M. M. ROBERTS, ET AL.,
Respondents.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statement of the Case 2

Argument—

I. The Court of Appeals Was Clearly Correct in Dismissing the Appeal for Want of Appellate Jurisdiction 4

II. Appeal from a Circuit Court on Matters Properly Determined by Three Judges Does Not Confer Jurisdiction on This Court under U.S.C. 1253 6

Conclusion 7

TABLE OF CASES

Good Shot v. *United States*, 179 U.S. 87, 45 L.Ed. 101, 21 S.Ct. 33 (1900) 7

Haining v. *Roberts*, 320 F.Supp. 1054 (S.D. Miss. 1970) 3

Haining v. *Roberts, et al.*, 453 F.2d 1223 ..... 4, 6, 7

Public Service Com. v. *Brashear Freight Lines*, 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083 (1941) 5

Turner v. *Goolsby*, 255 F.Supp. 724 (S.D. Ga. 1966) 6

United States v. *Ga. Public Serv. Com.*, 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963) 5

OTHER AUTHORITIES

Mississippi Subversive Activities Act of 1950, §4064-10 through §4064-13, Mississippi Code of 1942 2

28 U.S.C. 1253 ..... 4, 6

28 U.S.C. 2281 ..... 3, 6

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OPINIONS BELOW

The opinions of the lower courts are adequately presented in the petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its opinion on December 29, 1971. Pursuant to the explicit provisions of 28 U.S.C. §1253, this Court lacks jurisdiction in this petition for certiorari.

QUESTION PRESENTED

Where a three-judge court properly decides all pending issues while duly constituted and in convention including plaintiff's claim of back pay and attorneys' fees, do the dictates of 28 U.S.C. 1253, require direct appeal to the Supreme Court?

STATEMENT OF THE CASE

This case arose out of a class action filed by Plaintiff Haining challenging the constitutionality of the Mississippi Subversive Activities Act of 1950, §4064-01 through §4064-13, Mississippi Code of 1942, and requesting a Three-Judge District Court to permanently enjoin the enforcement of the "loyalty oath" provisions of said statute as a prerequisite to state employment. Plaintiff had sought re-employment at the University of Mississippi Medical Center as an oxygen technician. (Haining had previously been employed at the Medical Center in the same capacity, but had resigned once and had been dismissed a second time.) On December 2, 1969, the plaintiff voluntarily accepted probationary employment, subsequently completing all the necessary papers, but refused to sign the loyalty questionnaire. Pursuant to the hereinabove named statutes and the policies and regulations of the Board of Trustees of Institutions of Higher Learning, the plaintiff's employment was terminated as a result of that act.

In addition to the declaratory relief heretofore discussed, the plaintiff also asked the federal panel to grant the following: (1) reinstatement of the plaintiff to his position as physical therapist trainee at the University of Mississippi Medical Center; (2) restoration of back wages; and (3) costs and expenses, including reasonable attorney's fees.

The Complaint herein was filed January 16, 1970, along with plaintiff's request for a Temporary Restraining Order. On January 23, 1970, Chief Judge Brown designated a Three-Judge District Court pursuant to 28 U.S.C. 2281 to hear the constitutional challenge against the Mississippi Subversive Activities Act. A hearing was held on February 6, 1970, before the Managing Judge on plaintiff's Motion for a Temporary Restraining Order which the District Court denied on February 16, 1970. The case was heard on March 3, 1970. The opinion of the Court was dated December 22, 1970, and filed December 29, 1970, and is reported as *Haining* v. *Roberts,* 320 F.Supp. 1054 (S.D. Miss. 1970).

In its Opinion, the District Court declared the Mississippi Subversive Activities Act of 1950 unconstitutional and granted plaintiff's request for a permanent injunction against further enforcement of the loyalty oath provision. The Court also conditionally reinstated Haining, providing that he must re-apply for his previous position within thirty (30) days, producing at that time proof of competency. Back pay was awarded in the amount of $209.12, the net amount earned as wages prior to discharge. All costs and expenses were assessed against the defendants. Judgment was entered January 11, 1971.

Subsequently, on January 21, 1971, plaintiff filed with the District Court panel a Motion to Amend Judgment to modify the award regarding back pay. This was denied. After receipt of affidavits from all parties, the Three-Judge Court denied this motion by opinion dated March 25, 1971, and entered an Order dated April 6, 1971.

Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit on the sole matters of denial of attorneys' fees and denial of the Motion to Amend

Judgment. Subsequently, the Circuit Court requested and was furnished supplemental briefs on whether an appeal lay with the Supreme Court from the Three-Judge Court under 28 U.S.C. 1253. On December 29, 1971, the Court of Appeals dismissed plaintiffs' appeal for lack of appellate jurisdiction. The Court's opinion is reported, *Haining v. Roberts, et al.*, 453 F.2d 1223.

ARGUMENT

I.

The Court of Appeals Was Clearly Correct in Dismissing the Appeal for Want of Appellate Jurisdiction.

In an attempt to perfect an appeal to the Circuit Court, the petitioner herein presented for the court's consideration the denial of attorneys' fees and a denial of the Motion to Amend the Judgment. Respondents assert that all these matters were properly before a Three-Judge Court and the three judges accurately exercised their judicial authority rendering a written opinion relative to these requests. Petitioner improperly placed his appeal with the United States Court of Appeals for the Fifth Circuit. Statutorily, any appeal from such an opinion is with the Supreme Court of the United States. 28 U.S.C. 1253 specifically states:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

In its interpretation of the language contained in §1253, the United States Supreme Court has held that once a three-judge court has been properly convened, the case can be disposed of by that court or on appeal by the United States Supreme Court on any ground whether or not it would have justified the calling of a three-judge court. *United States* v. *Ga. Public Serv. Com.*, 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963). Respondents submit that the Court of Appeals' determination herein comes within the ambit of this authority.

The most often cited case concerned with this particular question of jurisdiction is *Public Service Com.* v. *Brashear Freight Lines*, 312 U.S. 621, 61 S.Ct. 784, 85 L.Ed. 1083 (1941). In that case a statutory three-judge court heard an application for an injunction to enjoin the enforcement of a state statute on the ground that it violated the Federal Constitution. The injunction was denied, but there remained in the case the matter of awarding damages which had arisen out of the granting of a temporary restraining order pending the hearing. The Supreme Court held it was error not to assess these damages in the pending suit, but this should be done by the original district judge acting alone.

However, a clear distinction can be made here from *Brashear* and appellees state that the language of the opinion does not support the opponent's position. First, *Brashear* was confronted with a singular, factual situation. There a three-judge federal panel was *reconvened* to consider ancillary questions later presented. The original court had concluded its work and the motion to assess damages clearly was an afterthought. Secondly, and on the other hand, appellees state that the opinion in this particular case completely adjudicated the issues and, thereby, negate any analogy between the two cases. Fur-

ther, the jurisdictional question before this court is similar to one decided by a three-judge court in 1966, *Turner* v. *Goolsby*, 255 F.Supp. 724 (S.D. Ga. 1966). Counts I and II of the Complaint in that case attacked the constitutionality of two Georgia criminal statutes; Count III alleged a conspiracy to deny plaintiffs their constitutional rights by maintaining school segregation. The court recognized that its jurisdiction under §2281 was founded on Counts I and II and determined "as a matter of discretion" to exercise jurisdiction over Count III. The court elected to exercise jurisdiction because the three counts were "so interrelated as to present one continuous transaction or set of operative facts * * *." 255 F.Supp. 731.

II.

Appeal from a Circuit Court on Matters Properly Determined by Three Judges Does Not Confer Jurisdiction on This Court under U.S.C. 1253.

Respondents herein feel that it is unnecessary to improve upon applicable language in the Circuit Court Opinion concerning this topic. There the Appellate Court stated very succinctly the posture of petitioner's claims. First, that the appellant-petitioner sought review of matters of remedy submitted to and decided by the Three-Judge Court on the merits as part of the injunction sought. Secondly, the Court noted that appellant-petitioner's motion was filed after the Judgment of the statutory court was entered and that it concerned a subject matter dealt with by the three judges requesting that the Judgment entered by the special court be amended. *Haining* v. *Roberts, et al.*, 453 F.2d 1223, 1224.

Pointedly, the Opinion of the United States Court of Appeals for the Fifth Circuit was purely jurisdictional:

> "Appellant having filed this appeal in the wrong court, it is dismissed."

Haining v. *Roberts,* supra, at 1225.

Since the Circuit Court of Appeals did not have jurisdiction, the petition for writ of certiorari must be denied. When confronted with a similar jurisdictional question, this Court in *Good Shot* v. *United States,* 179 U.S. 87, 45 L.Ed. 101, 21 S.Ct. 33 (1900) held:

> "In this case there is no judgment in the circuit court of appeals, and the sole question certified relates to the jurisdiction of that court, and it having been determined that jurisdiction does not exist, the writ of certiorari cannot properly be issued to require the court to send up a cause over which it has no jurisdiction for determination on the merits."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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